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November 19, 2009

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By Email to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)  
and FedEx Delivery

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, DC 20551

Re: Docket No. R-1370

Dear Ms. Johnson:

I appreciate the opportunity to file this "Comment Letter" with the Federal Reserve regarding issues related to the proposed regulations implementing the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (CARD Act)<sup>1</sup>, specifically, in relation to Section 226.11 and the provisions intended to fulfill its requirement to establish a "Procedure for the timely settlement of estates of decedent obligors."<sup>2</sup>

Briefly, my firm represents the interests of creditors (including card issuers), assignees of card issuers, and servicers. Our firm is widely recognized throughout the country for its work and guidance to said entities. It is from this unique vantage-point that our firm seeks to provide commentary in order for the proposed regulations to more effectively implement the stated purpose of §140A of the CARD Act.

For the reasons set forth below, our firm recommends that the Card Act's list of examples of "reasonable procedures" that may satisfy the rule<sup>3</sup> be refined to focus on some of the truly practical steps that financial institutions may take to allow estate administrators to resolve deceased consumer accounts in a timely manner. It is equally important that the procedures set forth in the final rule incorporate well-established state probate law, which currently defines the timely resolution of estates, and avoid supplanting the framework created by each state to accomplish such timely resolution.

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<sup>1</sup> 15 U.S.C. § 1601 et seq.

<sup>2</sup> 15 U.S.C. § 1651.

<sup>3</sup> 12 CFR pt. 226.11(c) (Proposed September 28, 2009).

## I. Practical Procedures to Resolve Decedent Consumer Accounts

The proposed regulations implementing the CARD Act and relating to the timely settlement of estates define their main objective as requiring “creditors to establish procedures to ensure that any administrator of an estate can resolve the outstanding balance of a deceased accountholder in a timely manner”.<sup>4</sup> The proposed regulations define “resolve” in a manner that is twofold: allowing an administrator to, first, determine the amount; and, second, pay the deceased accountholder’s balance in a timely manner. The list of proposed reasonable procedures to accomplish these two objectives does not relate directly to the practical necessities of accomplishing them.

The first and most important issue for estate administrators involves identifying the department within the card-issuing financial institution that handles deceased accounts, since most credit card issuers do not distinguish between inquiries for deceased cardholders and general inquiries. Without reasonable procedures specifically tailored to the objective of timely resolution of deceased accounts, effective administration of these types of accounts will be difficult, especially in the case of multiple creditors.

### Proposed “reasonable procedures”:

Our proposed “reasonable procedures” include procedures that could be developed to facilitate the tasks of estate administrators including: the creation of a toll-free telephone number and address dedicated to serving administrators and the publication of contact information for dedicated departments on creditor websites and printed materials such as billing statements.

We also recommend “reasonable procedures” be delineated to clearly identify the steps necessary for an administrator to make proper notification of death and to resolve account balances. These steps could include, but are not limited to, mailing of a death certificate to a designated estate business unit, placing a phone call to a specific toll-free telephone number or sending a letter to a designated address. These steps could then be published at the creditor’s website or in other correspondence.

Further, with respect to the proposed “reasonable procedures” to deal with ways in which a creditor might “waive” estate liability, a question arises as to the relevance of this in the context of a statutory provision that currently contains no reference, directly or indirectly, to *discounted settlements*. While under specific circumstances, a waiver or limitation of estate liability may be appropriate, the proposed procedures are outside the scope of the stated objectives of this section<sup>5</sup> and do not, themselves, accomplish the defined goal of allowing the administrator to identify and pay an outstanding balance in a timely fashion.

## II. Probate Law and the Resolution of Deceased Consumer Accounts

The proposed rules note that creditors may maintain some procedures already in place to comply with state and federal laws governing probate. In accordance with well-understood

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<sup>4</sup> Ibid.

<sup>5</sup> 12 CFR pt. 226.11 (Proposed September 28, 2009).

principles of federalism, probate law is an area perennially *reserved to the states*, which create clear timelines and requirements for the filing of creditor claims. In cases where a creditor has been notified by an administrator that a probate has been opened, reasonable procedures for creditors should include the timely presentation of court-approved estate claim forms in the manner provided by state statute. The probate process outlined in each state's probate code establishes a well-defined mechanism for creditors to notify administrators of estate claims in a timely fashion and of their precise amounts. Therefore, in the case of a probated estate, compliance with state probate law actually already accomplishes the stated objective of the CARD Act.

The reasonable procedures established in each state's probate code are well defined and have been used and publicized for decades. In fact, §140A's stated purpose is to require creditors to establish procedures for the timely resolution of estate matters. This very same purpose was the impetus for the creation of the state probate codes. The courts have long and consistently held that the declared goal and purpose of state probate codes is the timely administration of estates, sometimes referred to as efficient, expeditious and/or speedy administration of estates.<sup>6</sup> To create efficiency, the state probate codes rely, in part, on the requirements they set for creditors such as the timely presentment and filing of claims and the timely response to requests for documentation of a claim. Without incorporating a clear statement, in cases when a creditor has been notified by an administrator that a probate has been opened, deferring to these existing and well-defined procedures found in state probate law, proposed §226.11(c) risks usurping and potentially conflicting with the functions perennially reserved to the state probate courts, namely the timely resolution of decedent debts.

Proposed "reasonable procedure":

We recommend the adoption of compliance with state probate codes as a reasonable procedure when a creditor has been notified by an administrator that a probate has been opened.

### III. Conclusion

The CARD Act calls for the establishment of clear procedures for the timely resolution of the credit card accounts of deceased consumers, but the proposed regulation is not tailored to provide the requisite ease of communication. The proposed rule can be adapted in two key ways to

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<sup>6</sup> See e.g. courts confirming the stated purpose of the probate code generally as the efficient and timely administration of estates In re Estate of Baca 127 N.M. 535, 984 P.2d 782 (N.M.App.,1999); Carlin v. Mambuca 96 Ohio App.3d 500, 645 N.E.2d 737 (Ohio App. 8 Dist. 1994); Lawyers Surr. Corp. v. Larson 869 S.W. 2d 649, (Tex. App. Austin 1994); Children's Medical Center v. Ward 87 Ohio app. 3d 504, 622 N.E. 2d 692 (Ohio App. 2 Dist. 1993); Corlett v. Smith 106 N.M. 207, 740 P.2d 1191 (N.M.App.,1987); Matter of Estate of Wood 147 Ariz. 366, 710 P.2d 476 (Ariz.App.,1985); In re Estate of Lienemann 277 Neb. 286, 761 N.W.2d 560 (Neb. 2009); Bergeron v. Loeb 100 Nev. 54, 675 P.2d 397 (Nev. 1984); Matter of Kohlmetz' Estate 113 Wis.2d 160, 336 N.W.2d 176 (Wis.App.,1983); Sadler v. Wagner 3 Wash.App. 353, 475 P.2d 901 (Wash.App. 1970); Vitantonio, Inc. v. Baxter 116 Ohio St.3d 195, 877 N.E.2d 663 (Ohio,2007); In re Estate of Ongaro 998 P.2d 1097 (Colo.,2000); Matter of Estate of Taylor 207 Mont. 400, 675 P.2d 944 (Mont. 1984); Estate of Baldwin 442 A.2d 529 (Me., 1982); Estate of Halper 487 Pa. 408, 409 A.2d 415 (Pa. 1980); Nathanson v. Superior Court 12 Cal.3d 355, 525 P.2d 687 (Cal. 1974); Gall v. Rushon 21 Conn. Supp. 492, 157 A. 2d 607, (Conn. Super. 1959); Ralston v. Bank of Clarksdale 188 Miss. 345, 194 So. 923 (Miss. 1940); In Re Bishop 36 Haw. 403, 1943 WL 6374 (Haw. Terr. 1943).

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render it much more effective. Firstly, the rule's stated goal is to enable estate administrators to identify account balances and pay them<sup>7</sup>, but three of four proposed reasonable procedures involve debt forgiveness<sup>8</sup>, which is outside its scope. Rather, the establishment of practical procedures to enable administrators to easily identify and contact the appropriate business unit, understand how to close accounts and make contact by internet or regular mail, are steps that are tailored to achieve the rule's specific purpose. Secondly, real progress in facilitating administrators' timely resolution of estate matters can only be accomplished in the context of each of the several states' well-established, detailed procedures which are codified in statute and administered by courts across the country. In conclusion, any federal system of rules designed to facilitate timely resolution of estate accounts must incorporate a requirement to present timely claims in accordance with state probate law and procedure when a creditor has been notified by an administrator of a probate.

I appreciate your time and consideration to this matter.

Very truly yours,

BARRON, NEWBURGER & SINSLEY, PLLC



Barbara A. Sinsley

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<sup>7</sup> 12 CFR pt. 226.11 (Proposed September 28, 2009).

<sup>8</sup> 12 CFR pt. 226.11(c) (Proposed September 28, 2009).